Supreme Court, U.S.
FILED
96 580 SEP 30 1996

No. _____

In The

Supreme Court of the United States

October Term, 1995

GILBERT R. SYVERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED

1. Whether a jury must be instructed that before finding a person guilty of **Possession of an Unregistered Silencer Without a Serial Number**, contrary to 26 U.S.C. §§ 5841, 5845(a), 5861(d), 5861(i), 5871 the government must prove that the defendant knew the device was a silencer, i.e., that the device had the characteristics that bring the device within the scope of the National Firearms Act (ACT).

2. Whether a person can be convicted under Title 26 U.S.C. § 5845(b) and Title 18 U.S.C. § 922(o) (**Possession of a Machinegun**) when the person merely possesses parts legally bought through trade magazines that can be used to convert a semiautomatic weapon into a machinegun without requiring the Government to prove that the person intended to use the parts to complete such a conversion.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 4

A. Possession of the alleged silencer 5

B. Possession of the machinegun kits 5

REASONS FOR GRANTING THE PETITION 6

I. The Court of Appeals' Decision Conflicts With This Court's Holding in *Staples v. U.S.*, ___ U.S. ___, 114 S.Ct. 1793 (1994), That the Conviction of a Person Under 26 U.S.C. § 5861(d) Requires the Person to have Knowledge of the Characteristics that Brings the Device within the Scope of the National Firearms Act (Act) 7

II. The *Mens Rea* Element Required to be Convicted of Possession of a Machinegun Under 18 U.S.C. § 922(o) is an Important Question of Federal Law that Has Not Been, But Should Be, Settled By this Court 9

CONCLUSION 11

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Staples v. U.S., ___ U.S. ___, 114 S.Ct. 1793 (1994) 6, 7, 8

U.S. v. Staples, 971 F.2d 608 (10th Cir. 1992) 9

STATUTES

18 U.S.C. § 922(o)(1) 1, 4, 9

18 U.S.C. § 921(a)(24) 1

26 U.S.C. § 5841 ..... 2, 4

26 U.S.C. § 5845(a),(b) 3, 4, 8, 10, 11

26 U.S.C. § 5861(d),(i) 3, 4, 7, 8, 9

26 U.S.C. § 5871 4

26 U.S.C. § 1254(1) 1

PETITION FOR WRIT OF CERTIORARI

Gilbert R. Syverson respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unpublished. It is reprinted in Appendix A ("App. A") at page A-1.

JURISDICTION

The Court of Appeals entered its judgment on July 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Title 18 U.S.C. § 922(o)(1) provides:

> (o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

Title 18 U.S.C. § 921(a)(24) provides:

> (24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or

firearm muffler, and any part intended only for use in such assembly or fabrication.

Title 26 U.S.C. § 5841, **Registration of firearms,** provides:

(a) **Central registry.** – The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include –

(1) identification of the firearm;
(2) date of registration; and
(3) identification and address of person entitled to possession of the firearm.

(b) **By whom registered.** – Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) **How registered.** – Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

* * *

(e) **Proof of registration.** – A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

The relevant sections of Title 26 U.S.C. § 5845(a) and (b) provide definitions for the following:

(a) **Firearm.** – The term "firearm" means * * * (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code);

(b) **Machinegun.** – The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

Title 26 U.S.C. § 5861(d) and (i) provide:

It shall be unlawful for any person –

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

* * *

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter.

STATEMENT OF THE CASE

Gilbert Syverson ("Petitioner") was charged in a five count indictment ("indictment") by a federal grand jury. Count one alleged that he possessed a silencer without registering it under the National Firearms Registration and Transfer Record in violation of Title 26 U.S.C. §§ 5841, 5845(a), 5861(d) and 5871. Count two alleged that he possessed the same silencer without a serial number on the item in violation of Title 26 U.S.C. §§ 5861(i) and 5871. Counts three and four alleged that Syverson possessed unregistered kits used to convert legal semi-automatic AK-47 rifles to fully automatic status (machineguns) through a milling and drilling process in violation of Title 18 U.S.C § 922(o)(1). Count five alleges that Syverson possessed an unregistered machinegun conversion kit for an AR-15 rifle which consisted of M-16 parts and a "drop-in auto-sear" which, when installed in the rifle, would permit it to fire automatically without any milling or drilling of the rifle in violation of Title 18 U.S.C. § 922(o)(1).

The jury returned verdicts finding Petitioner guilty of all five counts.

The court sentenced Petitioner within the sentencing guidelines as follows: 24 months as to count one, 24 months as to count two, 24 months as to count three, 24 months as to count four, and 24 months as to count five, with all sentences to run concurrent with each other for a total of 24 months. (Sentencing transcript p. 25).

The case was appealed to the Seventh Circuit Court of Appeals, which affirmed all counts on July 19, 1996.

A. Possession of the alleged silencer

Counts one and two of the Indictment involve Petitioner's possession of a cylindrical device that the government has labeled a "silencer" but which the defendant testified he manufactured as a muzzle break to lessen the recoil on his daughter's rifle. Such muzzle break is a legal device. The muzzle break incidently diminished the report of the weapon attached thereto to a degree which was not discernable to the human ear according to Dr. Douglas Wood, a clinical instructor and clinical audiologist at the Medical College of Wisconsin. (Trial Transcript pp. 218-222).

B. Possession of the machinegun conversion kits

Petitioner purchased parts from companies that advertised in national gun magazines to convert three of his semiautomatic weapons into automatic weapons. The Bureau of Alcohol, Tobacco, and Firearms ("BATF") contends that it is legal for the companies that advertised the conversion parts to sell the parts to Petitioner. (Trial Transcript p. 282). According to the BATF the conversion parts in conjunction with the instructions on installing the parts is the point when possessing conversion parts violates Title 18 U.S.C. § 922(o)(1). (Trial Transcript p. 282). The BATF states that Petitioner was in violation of the firearms regulations concerning the possession of an unregistered machinegun because under the "totality of the circumstances" (i.e. Petitioner's possession of the conversion parts and the instructions on how to use them) Petitioner was in violation of the law whereas the companies that sold him the parts were not because separate

companies sent Petitioner the conversion parts and instructions. (Trial Transcript pp. 174, 282).

Advertisements from the national weapons magazines from which Petitioner purchased the conversion kits stated nothing about registering requirements for machinegun conversion kits. (Trial Transcript pp. 254, 259, 262). Understanding that possessing a machinegun would require registration, after purchasing the conversion kits, Petitioner called the BATF which told him that he could not privately convert semiautomatic to fully automatic weapons. (Trial Transcript p. 242). At this point, Petitioner did nothing else with the conversion parts with the exception of trying to sell them to another party. Petitioner was never told that mere possession of these kits, he legally purchased, would become illegal upon receiving instructions on the use and installation of the parts.

REASONS FOR GRANTING THE PETITION

The decision below is in conflict with this Court's decision in *Staples v. U.S., supra,* 114 S.Ct. 1793 (1994) as to what *mens rea* elements are required to obtain a conviction for violation of certain firearm regulations. This case is an opportune time for this Court to give guidance and direct lower courts and government agencies as to what differentiates innocent behavior from criminal behavior in enforcing the regulation of firearms.

The holding below is erroneous and in conflict with *Staples, supra,* in two respects. First, it failed to require proof that the petitioner knew that the cylindrical device

he possessed had the characteristics of a silencer; and secondly, the Court failed to require the government to prove that Petitioner intended to use the parts in his possession to convert a semiautomatic weapon into a fully automatic weapon.

I. The Court of Appeals' Decision Conflicts With This Court's Holding in *Staples* that the Conviction of a Person under 26 U.S.C. § 5861(d) Requires the Person to have Knowledge of the Characteristics that Brings the Device within the Scope of the National Firearms Act (Act).

In *Staples, supra,* at 114 S.Ct. at 1804, this Court held that in order for a person to be convicted under 26 U.S.C. § 5861(d) of possessing an unregistered firearm, the person must know that the object that he/she possesses, in fact, has the characteristics that brings the object under the statutory definition of a firearm.

> " . . . [i]f Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect." *Id.*

In affirming Petitioner's conviction, the Seventh Circuit Court of Appeals erroneously approved the Trial Court's Jury Instruction omitting a requirement of *scienter*. Specifically the Trial Court instructed the jury that in order to convict Petitioner the government must prove "[f]irst that the defendant knowingly possessed a firearm; [silencer]; second, that the firearm was not identified by a serial number as required by Title 26 of the U.S.C.

§ 5861(i)." (Trial Transcript p. 353). Significantly in instructing the jury concerning the alleged violation of 26 U.S.C. § 5845(b), the Trial Court required that the government prove "[t]hat the defendant knew the firearm was a machinegun as that term is defined in Title 26 U.S.C. § 5845(b)." (Trial Transcript p. 355).

In so approving the instruction the Court of Appeals stated as follows, "Consequently, Syverson is mistaken in arguing that *Staples* required the government to prove that his cylinder actually muffled the report of a gun and that he new that the cylinder had this effect. Under *Staples*, the government had to prove the cylinder was made for the purpose of silencing a firearm, not that his purpose was realized. The definition of 'silencer' in the District Court's Jury Instruction adequately conveys this requirement." (Decision pp. 8-9). It is clear, however, that the Trial Court's Instructions, and the Court of Appeals' acceptance of same, is contrary to *Staples* requirement that the government prove *mens rea*, i.e. that Petitioner knew that the device was a silencer.

Now is the appropriate and proper time to grant certiorari on this issue because without this Court's guidance, lower courts and government agencies may continue to punish those that are innocent of criminal behavior, but are convicted because of the view that the absence of *mens rea* specifically mentioned by Congress in the Act is akin to strict liability. For a person to be convicted under § 5861(d) according to this Court's holding in *Staples*, that person must be aware of the physical properties that make a device a silencer (i.e. the device silences to some degree discernable to the human ear). Judge Ebel from the Tenth Circuit Court of Appeals

explains in his concurrence the reason why a scienter element should be included in the interpretation of § 5861(d),

> "[I]gnorance of the law is no defense, but a mistake of fact is. By analogy, to be guilty of larceny, an individual need not know that the taking of the property of another is illegal, but he must know that the property he is taking belongs to another." *U.S. v. Staples*, 971 F.2d 608, 618 (10th Cir. 1992).

Certiorari is appropriate at this time not only to correct the erroneous decision below, but to prevent the conviction of persons for the wholly innocent behavior of possessing traditionally legal firearms. Additionally, clear direction from this Court now will prevent what will undoubtedly be further conflicts between the Circuits and this Court.

II. The *Mens Rea* Element Required to be Convicted of Possession of a Machinegun Under 18 U.S.C. § 922(o)(1) is an Important Question of Federal Law that Has Not Been, But Should Be, Settled By this Court.

As stated above, this Court in *Staples*, made the decision that the serious consequences of being convicted under a violation of the National Firearms Act is not one of strict liability, rather requires some level of mental culpability. *Id.* at 1804.

Title 18 U.S.C. § 922(o)(1) merely states that it is unlawful to transfer or possess a machinegun. Therefore, to determine what constitutes a machinegun, it is necessary to read how "machinegun" is defined under Title 26

U.S.C. § 5845(b). Section 5845(b) is the only place that defines "machinegun" which in part states, "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun. . . . "

The Seventh Circuit Court of Appeals in the decision below, stated that the words "designed and intended" in reference to the conversion parts only define what constitutes a machinegun under § 922(o)(1) and that "intended" does not refer to the accused's state of mind, but rather refers to the manufacturer's intention in producing the parts. This is inappropriate since it is legal for such manufacturers to sell such parts. The Court of Appeals is thereby removing any *mens rea* requirement for conviction of an accused under § 922(o)(1). Therefore, the decision below is in conflict with this Court's ruling in *Staples* calling for the requirement of an element of mental culpability before being subjected to the serious consequences of being convicted under the Act. *Id.*

Under the Court of Appeals' decision, any part "designed and intended" by the manufacturer to convert semiautomatic weapons into a fully automatic state is in violation § 922(o)(1). This definition would mean, however, that a manufacturer that produces conversion parts is violating § 922(o)(1). This is confusing since the BATF agent at the trial level of the present case testified that the essential element to Petitioner's conviction is the fact that he had instructions in conjunction with the conversion parts.

The BATF agent stated the reason the companies that sold the parts were not violating the law was because one

company sold the parts and another company sold the instructions. Therefore, the Seventh Circuit is ruling against its own interpretation of the definition of "machinegun" under § 5845(b) by affirming the decision that a manufacturer making the conversion parts and selling them is legal, but a person purchasing the parts and possessing instructions on using the parts is in violation of the Act.

Therefore, it is pertinent that this Court grant the petition to clarify this important matter of the mental culpability required to be convicted for violation of the National Firearms Act.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-3755
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT R. SYVERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 94 CR 69 – **Thomas J. Curran,** *Judge.*

ARGUED NOVEMER 3, 1995 – DECIDED JULY 19, 1996

Before CUMMING, CUDAHY, and KANNE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This case principally involves questions about what is required to prove *mens rea* for violations of certain federal criminal statutes that regulate the possession of firearms, specifically machine guns and silencers. The government alleged that Gilbert Syverson violated these statutes by knowingly possessing several questionable items: a metal cylinder that could slightly diminish the report of a pistol, a variety of unassembled gun parts, a couple of semi-automatic rifles and instructions for using the parts to convert a semi-

automatic rifle into a machine gun. Syverson admits possession of the items, but he contends that the government should have proven more than it did prove about his mental state with respect to them. He also argues that his trial counsel was unconstitutionally ineffective for not more actively advocating this view of the evidence regarding his mental state. For the reasons set forth below, we affirm the judgment of the district court.

I.

Syverson's trouble began when he made some harassing phone calls to his former girlfriend. She complained about these calls to the police who went to Syverson's apartment to investigate. Their investigation persuaded them to take Syverson into custody. While preparing to leave with the officers, Syverson rifled through his belongings in search of his keys. As he did so, the police noticed some gun parts. After this discovery, they searched Syverson's apartment with his consent, uncovering semi-automatic weapons, more gun components and videotapes that illustrated a method for using those gun components to convert a semi-automatic weapon into a machine gun. They also found a .22 caliber pistol with a homemade metal cylinder attached to the end of the barrel. The cylinder was not identified by any serial number, nor was it registered. After conducting some tests on the cylinder, government officials concluded that it was a silencer.

These discoveries led the government to charge Syverson with violating federal firearms law. Specifically the government alleged that Syverson had violated 18 U.S.C.

§ 922(o), which provides that it is unlawful for any person to knowingly possess machine guns or their constituent parts, whether or not those parts are assembled. *See United States v. Ross*, 40 F.3d 144, 146 (7th Cir.1994) (defining the *mens rea* element for § 922(o)). The government also alleged that, by possessing the homemade silencer, Syverson had violated several statutes, namely 26 U.S.C. §§ 5841, 5845(a), 5861(d), 5861(i) and 5871, which make it illegal to possess a silencer that does not have a serial number and has not been registered in the National Firearms Registration and Transfer Record.

At trial, the government introduced evidence designed to prove that Syverson had possessed semi-automatic weapons, the gun components and the metal cylinder; and it showed the videotape that demonstrated the method for turning the semi-automatic weapons into machine guns. It also introduced evidence showing that Syverson had knowingly possessed the cylinder and that it could be used to reduce the report of a pistol from 151 decibels to 144.5.

Syverson's case consisted largely of his own testimony, in which he denied that he intended to assemble the parts into a machine gun or that he knew that the cylinder worked as a silencer. He asserted that he had, at one time, thought about making a machine gun; but he claimed that he had given up the idea when he learned from the Bureau of Alcohol, Tobacco and Firearms that such a project would be illegal. One witness corroborated this testimony by recalling an earlier conversation in which Syverson had reflected this state of mind. Syverson also testified that he had designed and made the cylinder himself, as a prototype for a muzzle break, a device that

reduces the recoil of a rifle. Another witness testified, in effect, that the cylinder was not a silencer because a person with average hearing could not hear the reduction in sound that it effected.

The district court instructed the jury as to the elements of the offenses regarding the machine gun and the silencer. The jury convicted Syverson on all five counts.

II.

Syverson challenges his convictions on the machine gun charges by arguing that the government did not have sufficient evidence to prove that he had a culpable mental state. Specifically, he contends that the elements of § 922(o), as defined in the statute itself and in the jury instructions, required the government to prove that he intended to use the unassembled gun parts to convert his semi-automatic weapons into machine guns. And he maintains that the government did not introduce evidence on this point.

In ordinary circumstances, appellants face formidable obstacles in showing that a judgment against them is invalid for want of sufficient evidence. *United States v. Hickok*, 77 F.3d 992, 1002 (7th Cir.), *cert. denied*, 116 S.Ct. 1701 (1996). In this case, Syverson faces even greater obstacles because his trial counsel failed to move for an acquittal at any of the appropriate times for such a motion. Consequently, he is deemed to have waived any appellate arguments about the sufficiency of the evidence. This waiver lowers our standard of review to plain error with respect to this issue. Syverson must show that the evidence supporting his conviction was so insufficient

that his convictions amounted to a manifest miscarriage of justice. *See United States v. Archambault*, 62 F.3d 995, 998 (7th Cir.1995).

According to 18 U.S.C. § 921(a)(23), the meaning of the term "machine gun" in § 922(o) comes from 26 U.S.C. § 5845(b). Section 5845(b) defines "machine gun" as a completely assembled gun that fires automatically or as a combination of parts that are "designed and intended[ ] for use in converting a weapon into a machine gun."

As the government and the district court have read this combination of statutes, the government could prove that Syverson violated § 922(o) by showing: that he knowingly possessed a "combination of parts," that the manufacturer of those parts had designed and intended them for use in converting a weapon into a machine gun and that he knew of this use for the parts. *See Ross*, 40 F.3d at 146. Syverson does not dispute that the government introduced sufficient evidence to prove these three elements.

But Syverson's interpretation of the relevant statutes leads him to argue that the government must prove a fourth element: that he intended to use the parts to make a machine gun. He does not complain that the jury instructions failed to inform the jury about this requirement; he seems to believe that the instructions as given were adequate and that they were misunderstood or misapplied. In his view, when the statute refers to parts that are "designed and intended" to convert a weapon into a machine gun, the phrase, "designed and intended," cannot refer solely to the manufacturer's conception of the parts. He believes that, if the phrase did, the words

"designed" and "intended" would have essentially the same meaning and would therefore be redundant. Syverson thus argues that the two words in the phrase must each refer to different things, relying on the well-established principle that statutory construction abhors a redundancy. *See Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1272 (7th Cir.), *cert. denied*, 114 S.Ct. 602 (1993). He maintains that "designed" refers to the manufacturer's conception of the parts and that "intended" refers to the defendant's thoughts about the parts.

After examining the context for the language that defines "machine gun," we must reject Syverson's interpretation of the statute. As we noted, the language upon which Syverson focuses comes from 26 U.S.C. § 5845(b). This section defines "machine gun" for the purposes of statutes that regulate the possession and use of weapons. This definition has evolved over time. Originally, "machine gun" referred only to fully assembled machine guns. In 1968, the Gun Control Act expanded the definition to include "any combination of parts from which a machine gun can be assembled." Finally, in 1986, Congress recognized that so-called "machine gun conversion kits" posed a threat to the effective enforcement of the regulation of machine guns. These kits permitted individuals to convert a semi-automatic rifle into a machine gun. Congress sought to subject these conversion kits to the regulations on machine guns by adding to the definition of machine gun in § 5845. Consequently, Congress amended § 5845(b) again, providing, in effect, that a collection of parts "designed and intended" to convert a weapon into a machine gun was the functional equivalent of a machine gun. Through this evolution of the statute,

Congress has sought to identify all of the things that can constitute a machine gun. *See United States v. Evans*, 712 F.Supp. 1435, 1438 (D.Mont. 1989) (discussing the development of § 5845); *see also* H.Rep. No. 945, 99th Cong., 2d Sess. 28, *reprinted in* 1986 U.S.C.A.A.N. 1326, 1354.

Accepting Syverson's argument would require us to hold that § 5845(b) does more than define all of the things that can be called "machine guns;" we would have to hold that it also defines the mental states required for certain substantive offenses. As we have seen from its evolution, however, § 5845(b) has nothing to do with defining culpable mental states. Its sole purpose is to define things. Therefore, within the context of § 5845(b), the only referent for the adjectives "designed and intended" is the manufacturer of the parts, not the accused who is charged with the unlawful use of those parts. When § 922(o) interpolates the term "machine gun" from § 5845(b), it cannot change the referents for the phrase "designed and intended." To do so would be to change the meaning of "machine gun," and the statutory scheme of which § 922(o) is a part does not permit such a change. According to the plain language of § 921(a)(23), § 922(o) does not give meaning to "machine gun;" it borrows the meaning for that term from § 5845(b). Therefore, Syverson's reading of the statutes is untenable.

We should note that, in any event, the trial record does contain circumstantial evidence showing his intentions with respect to the conversion kit. By showing that Syverson knowingly possessed semi-automatic rifles, that he knowingly possessed a conversion kit and that he knowingly possessed instructions for converting the rifles

into machine guns, the government has made a substantial showing about Syverson's intention to make a machine gun. A jury could certainly infer that Syverson possessed all of these things because he intended to use them for an illegal purpose; and Syverson's own denials of this intention do not necessarily make this inference unreasonable. The reasonableness of this inference only makes it more obvious that there was no miscarriage of justice with regard to the sufficiency of the evidence on the machine gun counts.

III.

Syverson makes two related challenges to his convictions on the counts pertaining to his possession of a silencer. He first argues that the district court's jury instructions did not properly identify the elements of these offenses; and he argues that the evidence relating to these offenses was insufficient to convict him even if the elements were not as he had argued.

A.

The government charged Syverson with two offenses arising from his possession of the cylinder. First, it alleged that he violated 26 U.S.C. §§ 5841, 5845(a), 5861(d) and 5871, which prohibit the possession of an unregistered firearm. Second, it alleged that he violated 26 U.S.C. §§ 5861(i) and 5871, which make it unlawful for any person to possess a firearm that does not have a serial number. According to 18 U.S.C. § 921(a)(3), a silencer is included in the definition of a firearm; and, under 18 U.S.C. § 921(a)(24), a silencer is "any device for

silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed and intended for use in assembling or fabricating a firearm silencer . . . and any part intended only for use in such assembly or fabrication." In instructing the jury, the district court employed an abbreviated version of the definition of "silencer" in § 921(a)(24), noting that a silencer is "any device for silencing, muffling, or diminishing the report of a portable firearm."

As he did with the machine gun charge, Syverson argues that the government should have been required to prove more than it did prove. Syverson derives this argument from *Staples v. United States*, 114 S.Ct. 1793 (1994), in which the Supreme Court discussed the mens rea requirements of § 5861(d), one of the statutes under which he was charged. That statute does not explicitly provide a *mens rea* requirement for any of the crimes that it defines, but the Supreme Court held that it did not thereby create strict liability crimes. In *Staples*, the Court interpolated knowledge as the *mens rea* requirement. *Id.* at 1804. It held that the government could obtain convictions under § 5861(d) by proving that the defendant knew of the features of the firearm that brought it within the regulation of the statute. *Id.*

Syverson contends that *Staples* applies to both § 5861(d) and § 5861(i) and that it requires the government to prove that he knew that the cylinder actually reduced the report of a gun. This argument depends upon the premise that § 921(a)(24) provides that "silencing, muffling or diminishing" is one of the features of silencers. In other words, Syverson presumes that § 921(a)(24) only regulates silencers that actually work.

This presumption is, however, contrary to the plain language of the statute. Syverson correctly points out that *Staples* controls the definition of the elements of the offenses in this case. Under *Staples*, the government can prove that a defendant knowingly possessed a silencer by proving that the defendant knowingly possessed an item and that he knew that the item had the features of a silencer. But Syverson incorrectly identifies the salient features of silencers. As noted above, the statute defines a silencer as "any device *for* silencing, muffling, or diminishing" the report of a firearm. Moreover, the statutory text notes that such a device can include a combination of parts designed or intended for use in assembling a silencer; it can even include a single part that is intended only for use in making a silencer. Thus, the statute does not limit the definition of a silencer to "a device *that* silences, muffles, or diminishes." This is a significant difference. By the language of the definition, Congress has indicated that it intends to regulate all devices purporting to serve as silencers, not just those devices that actually work to silence firearms. Therefore, a device can be a silencer for the purposes of § 921(a)(24) even if it does not actually silence.

Consequently, Syverson is mistaken in arguing that *Staples* required the government to prove that his cylinder actually muffled the report of a gun and that he knew that the cylinder had this effect. Under *Staples*, the government had to prove that the cylinder was made for the purpose of silencing a firearm, not that this purpose was realized. The definition of "silencer" in the district court's jury instructions adequately conveyed this requirement.

B.

Regardless of the preceding argument, Syverson accepts the fact that the government had to prove that his cylinder purported to be a silencer. He argues that he should not have been convicted because the record contained no evidence that would make this proof. As we have noted, we will consider this argument according to the plain error standard because Syverson did not move for an acquittal during the trial.

Because Syverson was the designer and manufacturer of the cylinder, his intentions determine whether it purported to be a silencer. In his trial testimony, Syverson professed his intentions, insisting that he had designed and manufactured the cylinder to be a muzzle break. A muzzle break is a device that reduces the recoil of a gun by permitting the dispersion of the hot gasses [sic] that emerge from the end of the gun barrel when a round is fired and force the barrel upward. He explained that his daughter had wanted a muzzle break so that she could more accurately fire her rifle; and he claimed that the cylinder on the pistol was a prototype of the muzzle break that he planned to manufacture for her. His daughter's testimony corroborated this account. In Syverson's view this is the only evidence in the record that reflects on his intentions. This evidence alone does not, of course, prove that the cylinder was a device for silencing, muffling or diminishing the report of a firearm.

Contrary to Syverson's characterization of the record, there was evidence showing that he intended the cylinder to be a silencer. Part of that evidence was negative, casting doubt on his professed intentions. A government

expert testified that muzzle breaks usually have slots cut into them; these slots are the means by which muzzle breaks disperse the hot gases expelled from a gun barrel. Syverson's cylinder had no slots. According to this expert's testimony, Syverson's cylinder would not have done much, if anything, to reduce the recoil of a firearm. In addition, the government offered evidence that the cylinder did reduce the report of a pistol, albeit slightly. This evidence would be enough to allow a reasonable jury to infer that Syverson's description of the cylinder was not credible and that it was made to be a silencer, even if it was not particularly well made. This was more than enough evidence to support Syverson's conviction.

IV.

Syverson's final challenge to his conviction depends upon his claim that he received ineffective assistance of counsel at trial. He raises this argument for the first time on appeal. Ordinarily, we will not take jurisdiction of a claim of ineffective assistance unless the appellant has, as is usually not the case, raised the issue at trial. *United States v. Langer*, 962 F.2d 592, 597 (7th Cir.1992). We can, however, take jurisdiction of such claims when they rest on the trial record alone and when the defendant's attorney on appeal is not the same person who represented him at trial. *United States v. Boyles*, 57 F.3d 535, 550 (7th Cir.1995). Syverson's claim meets these conditions.

The Supreme Court has held that a defendant may sustain a claim of ineffective assistance of counsel by showing that his or her counsel's performance was deficient and that this deficient performance prejudiced his

or her case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Syverson finds deficient performance in his trial counsel's failure to move for a judgment of acquittal based on the sufficiency of the evidence arguments he makes on appeal. As Syverson sees it, criminal defendants have nothing to lose and everything to gain by moving for a judgment of acquittal. Given the relative costs and benefits of such a motion, he believes that every competent defense lawyer would always make such a motion and that his trial counsel's failure to do so is the sign of incompetence, and therefore, deficient performance. His argument with respect to the prejudice element is very sketchy. It consists entirely of the assertion that this deficient performance prejudiced him because it led to an outcome for his trial that violates principles of fairness and justice.

Putting aside any question about whether Syverson's trial counsel performed deficiently, we conclude that Syverson did not suffer any prejudice from counsel's failure to move for an acquittal. Because the evidence against Syverson was sufficient to warrant his conviction, no prejudice could arise from trial counsel's failure to challenge the sufficiency of that evidence through a motion for acquittal. *See United States v. Pedigo*, 12 F.3d 618, 623 (7th Cir.1993).

The judgment of the district court is

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit